

Subject: Object to wetlands disruption, local expert.

Resent-From: BarnesNursery.Comments@noaa.gov

Date: Mon, 16 Dec 2002 17:07:03 EST

From: <Jablakeman@aol.com>

To: barnesnursery.comments@noaa.gov..nems.noaa.gov

Dear Ms. Holt

I am a local (Erie County, Ohio) natural history expert, ecologist, and professional native landscapes designer. In the 1970s, when the Sheldon Marsh State Nature Preserve was still privately owned, I wrote the original ecological site assessment, from which the State of Ohio decided to accept the land's donation as a state natural area.

As you know well, the marsh in question (the Barnes project) is among the highest quality open, un-diked marshes left in all the Great Lakes, not just on Lake Erie. I am intimately familiar with the wetland and upland habitats of the entire area, and the illegal, unpermitted dredging by Barnes Nursery is a clearly present danger and disruption of the Category III wetlands through which it has been surreptitiously installed.

Continuance of the disruption, in any form, will continue to degrade the wetlands by a number of processes, but particularly by the provision of habitat for aggressive ecotypes of *Phragmites australis* and other marsh-consuming alien weeds. These aggressive species have already colonized the Barnes' dikes in the wetland, from which they will continue to colonize the otherwise incomparable shallow water-mudflat habitat.

The disruption of the marsh's hydrology is described by others. Drainage disruptions directly impact the quality of the marsh, and on this basis alone any further disruption should be prohibited. Restoration of the entire marsh environment, particularly the destruction of the created dikes and refilling of the dredged areas must be completed in 2003. Any delay will permanently degrade this high quality marsh.

Sincerely,

John A. Blakeman

Meadow Environments LLC

2412 Scheid Rd.

Huron, OH 44839 419-433-5639 *jablakeman@aol.com*

Subject: Great Lakes United Supports State of Ohio
Resent-From: BarnesNursery.Comments@noaa.gov
Date: Wed, 18 Dec 2002 20:13:07 EST
From: <Ohgreenway@aol.com>
To: barnesnursery.comments@noaa.gov
CC: Sam.Speck@DNR.State.OH.US, Pskherarts1@aol.com, wooster@glu.org

Dear Ms Holt,

I am the Lake Erie Director for the Board of Directors of Great Lakes United. Our comments in support of the State of Ohio to dismiss the Barnes Nursery appeal are attached. We have long standing in this issue. Also attached are comments which we submitted during the 401 water quality certification for an after the fact permit filed by Barnes.

If you require additional information on Great Lakes United, please contact Margaret Wooster, Executive Director, Great Lakes United, Buffalo State College, Cassetty Hall, 13000 Elmwood Avenue, Buffalo, NY 14222 (716) 886-0142, (716) 886-0303 (fax), wooster@glu.org

You can contact me as listed below

Elaine Marsh
Project Director
Ohio Greenways
2179 Everett Rd.
Peninsula, OH 44264
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Barnes NOAA Appeal.zip

Name: Barnes NOAA Appeal.zip
Type: Zip Compressed Data (application/x-zip-compressed)
Encoding: base64

Great Lakes United
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Molly Holt
U.S. Department Of Commerce, (NOAA)
1305 East-West Highway, Room 6111
Silver Spring, MD, 20910

December 18, 2002

Re The Consistency Appeal of Barnes Nursery, Inc., from an
Objection by the State of Ohio, Department of Natural Resources

Dear Ms. Holt

These comments represent the view of Great Lakes United, a coalition of 170 organizations in the United States, Canada, and First Nations dedicated to protecting and restoring the lakes. We appreciate the opportunity to support the State of Ohio's denial of Coastal Consistency of the Barnes Nursery project.

We submitted comments to OhioEPA when this matter was under consideration for the 401 water quality certification of an after the fact permit. Those comments are attached.

We fully support the State of Ohio's request to dismiss the Barnes Nursery Consistency Appeal. We believe that the State accurately accounted the events in this matter as we experienced them. We support the State's assertion that the project has no national significance. In fact, it is the wetlands which Barnes illegally filed that have local, regional, statewide and national significance.

In its original brief, the State conveyed the legal and scientific justification to dismiss this appeal. We would like to fortify that message by supporting the underlying public interest in the coastal, habitat and water quality issues relating to Lake Erie. Lake Erie is the crowning jewel of the State. Because of its recreational, tourism, commercial and habitat values, it is one of the key economic generators in the State. Its fishery is among the world's largest. Its vast expanse drives the weather of coastal communities. And its quality has direct bearing on the quality of life in the basin.

Lake Erie is the personification of *downstream*. It is the collection vessel which reflects the success or failure of our rules, laws and management practices. With the return of anoxia, the emergence of e botulism and increased beach closings, the current portrait painted by Lake Erie is one which cries for increased vigilance. Not since the 1970's have we, as a lake community, been more acutely aware of the fragility of the Lake's ecosystem. Once again, Lake Erie is becoming associated with the unpleasantness of algal blooms and malodorous surface water. For the last two summers, dead fish and

birds lined our shores. Fishing and swimming pose threats to our health. These conditions demand management and enforcement which favor protection of the resource to fullest extent possible.

By contrast, you have before you the Barnes appeal. This request demonstrates a blatant disregard for the evidentiary requirements of your process. There is no demonstration of important or significant social or economic justification, no suggestion of public need, no alternatives analysis. The appeal virtually discounts the huge impact which Barnes' illegal activity has had on wetland and coastal resources. The Barnes appeal is without substantiation. And the benefits of the Barnes project, as concealed as they are, are inconsequential by comparison to those lost by impacts to the Lake, the wetlands and the Nature Preserve. This appeal should be dismissed both on merit and procedure.

Additionally, the applicant deserves no special consideration. The Barnes request trivializes the public interest in state owned resources, in water quality protection and in coastal management. Such singularity does not engender confidence in Barnes' ability to steward wetland, lake and coastal resources. And, as clearly demonstrated by the illegal construction of an inordinately oversized so-called irrigation channel, stewardship is nowhere demonstrated in Barnes current management practices. The channel was dug in July 2000 without any silt fence, concern for fish spawning, plant growth, water turbidity, pollution from construction equipment or disruption of the nearby endangered species habitats and nesting grounds. Despite the educational opportunities that this process has provided Barnes, there has been no attempt at restoration.

Lake Erie deserves careful review based on precautionary principles. Sheldon Marsh and all remaining coastal wetlands have immense value to Lake Erie. We view the Barnes project as an unsubstantiated and trivial scheme by an indifferent applicant.

We support the State's request for dismissal. We hope you will give Lake Erie a Christmas present and issue a dismissal. Further, we request that you support immediate restoration of the wetlands. We appreciate the opportunity to comment.

Sincerely,

Elaine Marsh
Lake Erie Director
Great Lakes United

CC: Sam Speck, Director of ODNR
Pat Krebs, Friends of Sheldon Marsh

Great Lakes United
Elaine Marsh, Lake Erie Director
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Laura Fay
OhioEPA, Division of Surface Water
Lazarus Government Center
P.O. Box 1049
Columbus, OH 43216-1049

December 15, 2001

Dear Ms. Fay,

These comments represent the view of Great Lakes United, a coalition of 170 organizations in the United States, Canada, and First Nations dedicated to protecting and restoring the lakes. We appreciate the opportunity to comment on the after-the-fact permit for a 401 certification requested by Barnes Nursery.

We have three recommendations on this permit: deny it, enforce immediate restoration and reprimand the offender

The most obvious reason to deny this permit is Ohio's commitment to Lake Erie and the value of these illegally-dredged wetlands to that great body of water. There is a tremendous amount of literature on wetlands in the western basin of Lake Erie. The ill-effects of wetland loss are a primary theme of all scientific analysis on the topic. And, the critical need to preserve remaining coastal wetland for shoreline protection, native fisheries, bird habitat and ecotourism is always the most urgent recommendation cited. None of the accepted body of knowledge on habitat, economics or water quality suggests that the value of this project is anything but miniscule in comparison with the value of wetlands that it illegally degrades.

In her presentation to the 2000 SOLEC (State of Lakes Ecosystem Conference), Sandra George of Environment Canada, represented the current State of Lake Erie, as defined by a bi-national team from Canada and the US. The findings were that, overall, the ecosystem of Lake Erie is mixed to mixed, deteriorating. According to this study, Lake Erie, as a whole, displays both good and degraded features, but, overall, conditions are deteriorating from an acceptable state. Contrary to unsubstantiated comments made by defenders of this permit, the Lake Erie ecosystem is NOT IMPROVING. The summary of this report listed the statement "Habitat Loss and Alteration is a major Concern" as the second in a list of six major concerns for the declining situation.

The findings of the 2000 SOLEC were published in *State of the Lakes 2001*. A summary of all indicators is attached; indicators specific to coastal wetlands follow.

Indicator Name	Indicator #	SOLEC Category	Assessment
Amphibian Diversity & Abundance	4504	Coastal Wetlands	Mixed, Deteriorating
Wetland Dependent Bird Diveristy and Abundance	4507	Coastal Wetlands	Mixed, Deteriorating
Coastal Wetlands Area by Type	4510	Coastal Wetlands	Mixed, Deteriorating
Effect of Water Level Fluctuations	4861	Coastal Welands	Mixed, Deteriorating

Our review of the permit shows a complete lack of justification based on Ohio's antidegradation policies. The applicant identified the current condition of the illegally-dredged channel as the *non degrading alternative*. This description is a statement of either the applicant's complete ignorance of water quality standards or complete disdain for the process. In either case, the antidegradation requirements for consideration of alternatives are not fulfilled.

Antidegradation is a policy based on allowing degradation of water quality only if designated uses can be maintained and if the proposed project has significant and important social, economic justification or fulfills a public need. We observe the following related to the basic tenants of antidegradation:

- Water quality benefits will be lost to state-owned, regionally-rare and significant wetlands. At the public hearing on December 10, 2001, there was sufficient evidence and testimony present by state and private experts that the condition created by the illegally dredged channel would impact the Category III wetlands of Sheldon Marsh and that state-owned habitat would be lost to native fishes, amphibians and other wildlife.
- No public need is identified.
- No social or economic justification is noted.

The mitigation plan, or lack thereof, does not meet OhioEPA standards. However, it is our contention that the functions of these wetlands cannot be mitigated. Impact on Sheldon Marsh caused by their loss would be irreversible.

Of all of the documents that we reviewed in this permit, the most outrageous was the suggestion that the applicant was investigating the use public dollars to offset the cost of mitigation!

This applicant deserves no special consideration of any kind. The illegal project was initiated wittingly; the after-the-fact permit is incomplete and shows a complete lack of understanding of the rules and regulations of the state; the deleterious effects of the illegal action are already apparent, even to the untutored eye; and there is a host of scientific information which clearly identifies project as a very bad idea.

We hope that OhioEPA will give Lake Erie an after-the-fact Christmas present. We urge you to deny the permit, enforce immediate restoration and apply the full extent of legal reprimand.

Sincerely,

Elaine Marsh
Lake Erie Director
Great Lakes United

Attachments:

Executive Summary of the *State of the Lakes 2001*, 1 page

State of the Lakes 2001 Indicators, 1 page

Wetland Loss: Fact and Critical Issues, Compiled by Great Lakes United, 1 page

CC: Sam Speck, Director of ODNR

Wetland Loss: Facts and Critical Issues

Compiled by Great Lakes United

In the last 50 years, more than *two-thirds* of Great Lakes coastal wetlands have been lost and many that remain have been degraded to the point where immediate intervention is required (*Strategic Plan for Wetlands of the Great Lakes Basin, 1993*).

Great Lakes wetland losses per state (*Mitch and Gossilink, 1994*).

- Minnesota has lost over 42% of its original wetlands
- Wisconsin has lost over 50% (5 million acres) of its original wetlands – over 90% in southeastern Wisconsin.
- Illinois has lost 85% of its coastal wetlands, Indiana, 88%.
- Over 55% of Michigan's original wetlands have been drained or filled.
- Ohio has lost 87% of its original coastal wetlands. Overall, Ohio wetlands decreased from 5 million acres to about 500,000 now. Ohio ranks second in the nation behind California in wetland acres lost (*Bouchard, 2000*).
- New York has lost over 60% of its original basin wetlands.

Coastal wetland drainage has occurred primarily in the lower lakes basin. Between 1967 and 1982, 85% of southern Ontario wetland losses were due to agriculture, mostly involving drainage (*Great Lakes Conservation Action Plan, 2000*).

83% of the original 9,637 acres of western Lake Ontario marshland has been lost, largely due to filling for urban and industrial uses. Some sections have lost 100% of coastal wetlands through filling, dredging and channeling (*Great Lakes Aquatic Habitat News, May-June 2000*).

In the United States as a whole, wetlands continue to be lost at an alarming rate – 400,000 to 500,000 acres per year or 52 acres lost every hour (*Hathaway, 1999*).

Five of the most crucial Great Lakes issues that require resolution are (*Great Lakes Wetlands Conservation Action Plan, 1997*):

Loss of wetland area through physical disturbance such as infilling for development and draining for agricultural purposes.

Degradation of wetland quality and function through pollution and water level regulation.

Lack of a generally shared vision for Great Lakes protection, rehabilitation, and creation.

Insufficient cooperation and coordination among levels of government.


Ineffective wetland protection through a combination of inadequate knowledge, inadequate legislation, policies, and guidelines, limited incentives for private ownership, and the lack of public commitment for the need to maintain wetlands

Subject: Barnes Nursery Appeal Comments
Resent-From: BarnesNursery.Comments@noaa.gov
Date: Mon, 23 Dec 2002 01:51:02 EST
From: <Pskherarts1@aol.com>
To: barnesnursery.comments@noaa.gov

Dear Ms. Holt:

Attached is my letter of comments supporting the state of Ohio's coastal zone management act consistency objection to the Barnes Nursery project in the Sheldon Marsh wetlands complex.

John A. Krebs M

 <u>John A.doc</u>	<p>Name: John A.doc Type: WINWORD File (application/msword) Encoding: base64 Download Status: Not downloaded with message</p>
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John A. Krebs
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Huron, Ohio 44839
December 20, 2002
(419) 433-2132

Molly Holt, Attorney Advisor NOAA
Office of the Asst Gen Council for Ocean Services
1305 East-West Highway, Room 611
Silver Springs, MD 20910

RE: Barnes Nursery Appeal, Sheldon Marsh

Dear Ms. Holt

[EXHIBITS 1-10 HAVE BEEN SENT TO YOU HARD COPY IN THE MAIL]

“Oh, what a tangled web we weave,

When first we practice to deceive

(Sir Walter Scott)

No adage could be more apropos to the present set of circumstances than this one. When reviewing this landmark case, one has to be impressed with the question “How did something this *obviously wrong*, get started in the first place.” As a 60-year resident and 50-year frequenter of the Sheldon Marsh area wetlands, perhaps I can cast some light on that subject.

In a nutshell, Army Corps actions. As stated in the Ohio Department of Natural Resources (ODNR) Initial Brief to the Secretary of Commerce, of all the agencies involved in evaluating this project, only the Corps supports it, to the point of being an “applicant (appellant) advocate”, a behavior precluded in the Clean Water Act , Section 404(q) (MOA between EPA and DOA) Part I (1) [EXHIBIT 1].

The whole debacle started with an illegal NWP 27 issued *in one day* (without *any* Public input or comment) by Gary Buck, Bowling Green, Ohio Field Office of the Buffalo District of the Army Corps. This approach was probably decided on because the APPELLANT and the Corps Field Office Staff knew the success of an Individual Permit would be unlikely because it would require public scrutiny, and permits by the Ohio EPA and ODNR. In fact, Ken Multerer from U.S. Fish and Wildlife told them both that at an on-site pre-application meeting on June 14, 2000. [Exhibits 2(a) and

2(c) p2.]. Mr. Buck also knew that the area involved an emergent wetland and that an *irrigation project* would not be allowed because he himself in 1991-92 processed the regulatory action of Violation #92-475-604 of Sections 10 and 404 against Charles Corso, one of the partners of the CCCMB Partnership listed as the APPLICANT on the original NWP 27 of June 19&20, 2000. This was for “unacceptable fill” in emergent wetlands (without any permits) , which was subsequently removed.

It was likely for the above reasons that the then new NWP 27 *vehicle* was chosen (no public notices, and lack of public familiarity) and the “project purpose” changed from irrigation to “Deep Water Habitat and Nesting Islands”. (One in a long series of name changes for the project purpose, which “appeared to be a reaction to the encountered opposition.” [EXHIBIT 5, para. 1]). The project application number also changed to PCN 2000-02170 from PCN 2000-01800, which number the Corps denied ever existed, yet used themselves repeatedly in intra-agency memos and E-mails, obtained by numerous citizen F.O.I.A. requests.

This scenario included the instructions of Gary Buck to Ken Multerer to destroy a *pertinent* Federal document (probably PCN 200-01800) which he admits giving to him on June 14, 2000, in his own *reconstructed* notes of October 19, 2000. This *reconstruction* was at the direction of Michael Montone, the new Project Manager replacing Mr. Buck. The necessity of this *reconstruction* was allegedly “required as portions of my E-mail and the Regulatory RAMS file were missing”, according to Mr. Buck. [EXHIBIT 2(b) pp.1&2]. This elaborate “shell game” seems to have been concocted to stifle concerned citizens’ inquiry into the original project plans. One is puzzled by why this was necessary if Mr. Buck did not feel the whole process was suspect in the first place.

This maneuver effectively and purposefully circumvented the normal permitting process, including public comment, and denied the citizens of Ohio *their* “due process”. The series of *unlikely* errors of judgment in evaluating this proposal, and the repeated decisions made in the wrong direction should be investigated as suggested by the Sierra Club’s Glenn W. Landers. [EXHIBIT 3(a)] However, any investigation should be done by a Federal agency having oversight powers on the Army Corps such as the USEPA. It should not have been done as an “internal review” by the Buffalo District Commander, as was related to Mr. Glenn Landers in the Corps response letter. [EXHIBIT 3(b)] That would be “like the fox watching the chicken yard”. Even the Corps itself states that concept in its publication CORPS FACTS: SUBJECT: Regulatory Program Overview, Delegation of Authority. “Regulatory program management and administration is focused at the district office level, with policy oversight at higher levels”. [EXHIBIT 9 p.2]

From July 2000 until January 2001 the Buffalo District Corps proceeded to “cover its own” for 6 long months, trying to justify “compliance” to an NWP 27 Permit they knew was illegal in the first place. As late as November 2000 they apparently still convinced the Assistant Secretary of Defense for Civil Works that the NWP 27 was a

viable permit that could be “complied with” by the APPLICANT (Appellant) [EXHIBIT 6]. Finally the Corps relented to outside pressures (from USEPA, ODNR, OEPA, Ohio’s Senator George V. Voinovich, enraged private citizens and conservation groups.) [EXHIBIT 4(a,b,c,d.)] and issued its January 5, 2001 PERMIT SUSPENSION DECISION DOCUMENT. [EXHIBIT 5].

Another agonizing 11 months ensued while the Buffalo Corps stonewalled with their patented version of the “after-the-fact” individual permit process, which really should be more accurately renamed “after-the-violation” individual lawbreakers’ reward process. We wholeheartedly agree with Senator Voinovich’s comments to The Assistant Secretary of the Army (Civil Works) of September 29, 2000.

“In light of the misrepresentation on the original nationwide permit, I urge the Corps to require Barnes Nursery to fully restore the area in a timely and efficient manner. I understand that Barnes Nursery can apply for a standard permit for the impoundment but believe full restoration should be accomplished while the individual permit is being considered”. [EXHIBIT 4(a)]

Instead, the Buffalo Corps proceeded to orchestrate a farcical public comment period and public hearing, the comments of which were arrogantly trivialized and summarily dismissed as irrelevant in their Environmental Assessment (E.A.) [please refer to the State of Ohio’s Brief, EXHIBIT M, p.25 para.2] The Corps realized they didn’t have a leg to stand on with the NWP 27, so they manipulated to get into their “after-the-fact” permit process with their “RATIONALE FOR DETERMINING NWP 27 IS NOT APPLICABLE” document of January 5, 2001. [EXHIBIT 5]

They may have proverbially shot- themselves- in the foot so to speak with that document. Its reasoning has insight and applicability while the reasoning in the E.A.is diametrically opposed in almost every aspect, condoning the project. The essence of the project itself remains the same “an illegal channel and side castings (however divided, arranged, or contoured) in a Category 3 Wetlands”. It has detrimental impacts delineated in almost every category of Part 230: Section 404(b)(1) Guidelines from Subpart C 230.20-230.24, Subpart D 230.30-230.32, and Subpart E 230.40-230.43. So why would the Corps dismiss the “same project” in one breath and then resurrect it in the next with its favorable Environmental Assessment and Provisional 404 Permit?

The answer is three-part. First of all, they wanted to avoid appearing to “dump” the APPLICANT (Appellant) and incur his wrath. Secondly, they wanted to avoid retribution for the illegally issued NWP 27 by making it appear that the NWP27 issue was not “germane” since *their* “regular” permitting process deemed the project to be “permissible” anyway.[EXHIBIT 3(b) p.2,para.1] Of course it made no difference to the Corps that the previous comments by the USEPA, USF&W, ODNR, and OEPA did not agree with any of their highly subjective interpretations of pertinent 404 (b)(1)criteria, etc. in their EA. Thirdly, they knew that interagency safeguards such

as this CZMA Consistency Objection [EXHIBIT 8 p. 2] and the OEPA denial of the 40 Permit would in all likelihood block their Provisional 404 Permit and prevent the release of the wrath of the general public on them in the national media and CONGRESS.

When the NWP27 was rescinded in January 2001, the APPLICANT (Appellant) advised the Buffalo District Engineer that "If any err has occurred, it is your unwillingness to Permit *our experiment* to be completed and tested with a long-term monitoring program". Your field staff is well experienced and has helped us develop a wise plan for East Sandusky Bay. We implore you to support your competent field staff; don't turn your back on them because Columbus bureaucrats can't see the value of a well-designed *experiment* to improve *our bay*". [EXHIBIT 10]

The citizens of Ohio do not want any "*experiments*" in a sensitive wetland adjacent to and contiguous with *their* Sheldon Marsh State Nature Preserve, especially by anyone as inexperienced in such matters as the APPELLANT and his HIRED CONSULTANT. Basically, no experience, no experiment! Unfortunately the Corps has listened to the APPELLANT'S whining about the Corps' "dashing of any hopes for accomplishing the laudable project goals"[EXHIBIT 10 p.2] and granted them a Provisional 404 Permit to *experiment*. Fortunately there are checks and balances such as the CZMA Consistency Objection to prevent such bizarre decisions from coming to fruition. The citizens of Ohio hope you will help us to that end, and uphold and refuse to override the State's Consistency Objection.

We agree with and support ODNR's Initial Brief stating that the APPELLANT's proposed activity is not consistent with the objectives and purposes of the CZMA And does not satisfy any of the three requirements under 15CFR 930.121.

Finally, is the subject of the Army Corps' flagrant misuse of AFTER-THE-FACT PERMITS, which act to protect and reward wetland law violators. In cases like this, restoration of the violation should come first, followed by the regular permitting process. As is, it sends the message to would be violators "go ahead and start without permits and more than 90% of the time we'll O.K. it later with an after- the- fact permit". We are afraid that if this landmark case does not send the appropriate message to the Corps and would be violators, sensitive wetlands nationwide will be "up for grabs".

Sincerely yours,

John A. Krebs, M.D

Friends of Sheldon Marsh

Subject: Sheldon Marsh
Resent-From: BarnesNursery.Comments@noaa.gov
Date: Thu, 19 Dec 2002 18:15:23 EST
From: <Fcbird@aol.com>
To: barnesnursery.comments@noaa.gov

What an awful situation that the dike and channel project has been constructed without the proper permits, and even the state says it is not in compliance. This should not be allowed. It sends the wrong message that we do not value these important natural areas such as Sheldon Marsh or that regulations and laws do not matter. Restore it!

Sincerely,
Carol Avril
Audubon Society of Ohio
Cincinnati